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JUL 24 2023

**OFFICE OF
WATER**

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July 21, 2023

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Re: *In the Matter of Request for Declaratory Ruling by McCook Lake Recreation
Area Association*

Dear Mr. Larson:

Enclosed please find a copy of the Chief Engineer's Prehearing Brief and Certificate of Service in the above-referenced file.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ann F. Mines Bailey".

Ann F. Mines Bailey
Assistant Attorney General

AFM/cmb
Enclosures

cc w/encs: Ron Duvall, DANR Water Rights Program

RECEIVED

JUL 24 2023

STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

OFFICE OF
WATER

WATER MANAGEMENT BOARD

IN THE MATTER OF REQUEST FOR)	CHIEF ENGINEER'S
DECLARATORY RULING BY)	PREHEARING BRIEF
MCCOOK LAKE RECREATION AREA)	
ASSOCIATION)	

Comes now, the Chief Engineer and presents this prehearing brief to the Water Management Board outlining the issues before the Board and the position of the Chief Engineer on each.

BACKGROUND

Pending before the Water Management Board is a petition for declaratory ruling from the McCook Lake Recreation Area Association (Association). The Association seeks a declaratory ruling from that Board "that the alteration of a public water body by a private party requires a permit for the appropriation of water, consistent with Mr. Gronlund's testimony to the Agriculture and Natural Resources Committee and consistent with State law." Accompanying the petition, is a sheriff's return of personal service on Michael James Chicoine.

The facts set forth in the petition provide that "representatives of the South Dakota Department of Agriculture and Natural Resources have told the Association that the expansion of a public lake by a private party does not require a permit to appropriate water." The petition further provides that Chief Engineer Eric Gronlund testified to the South Dakota House Agriculture and

Natural Resources Committee regarding the potential effects of HB 1134 as amended. HB 1134, as amended, proposed to require that an applicant for “a permit authorizing the construction of a channel, or any other shoreline modification that would artificially expand the water surface of an artificial body of water by more than four thousand square feet” would be required to submit evidence of the consent of a majority of landowners before the permit could be issued.¹ The petition provides that Chief Engineer Gronlund testified that HB 1134 “‘potentially circumvents any opportunity for a full hearing on the merits of an application’ and that ‘a well-established water rights procedure affording the opportunity for meaningful public participation and public hearing is potentially being upended.’” The Association contends that that these two representations are contradictory and that therefore this declaratory ruling is necessary. The petition concludes by asking that the Board “issue a Declaratory Ruling that the alteration of a public water body by a private party requires a permit for appropriation of water, consistent with Mr. Gronlund’s testimony to the Agriculture and Natural Resources Committee and consistent with State law.”

Attached to this petition is a letter from the Association, signed by Dick Lohry, President, to William Larson, Chairman of the Water Management

¹ HB 1134 as originally proposed required that before “a permit authorizing the construction of a channel, canal, ditch, outlet, or any other shoreline alteration, which the issuing entity determines is likely to raise or lower the water level of a public lake” could be issued by any state agency or political subdivision, the applicant would have to submit written evidence of consent of the majority of all property owners. It was amended at the beginning of the committee hearing to the language presented in the body of this motion.

Board. The letter is dated December 5, 2022. The letter provides that Mike Chicoine “has applied for several permits to construct a canal off the southeast end of McCook Lake”.² The Association holds two water right permits authorizing the use of water from the Missouri River which the Association pumps into McCook Lake in an effort to maintain the water elevation. The letter continues on to express concerns that construction of a canal as proposed by Mr. Chicoine will result in “the appropriation of water from McCook Lake to meet the evaporation and seepage losses from the [c]anal.” The letter further asserts that the “[t]aking of the Lake water is a taking from the [Association] water right which must be appropriated as required by law.”

The public notice, prepared by the Association, provides that the Association is seeking a ruling that “Michael Chicoine/Dakota Bay, LLC are required to make an application to the Water Management Board for a permit to appropriate water before starting any construction or placement of works to expand McCook Lake for Michael Chicoine’s/Dakota Bay, LLC’s private use, because the proposed construction appropriates the water of McCook Lake and would also unlawfully impair the McCook Lake Recreation Area Association’s water rights.”³

² The letter provides that a copy of Mr. Chicoine’s application for a shoreline alteration permit is attached but it does not appear that the attachment was submitted with the petition.

³ At the June 30, 2023, hearing regarding the motion to continue this matter from its originally scheduled July 12, 2023, hearing date, counsel for the Association represented that the issue as to whether Mr. Chicoine’s Dakota Bay’s project would unlawfully impair the Association’s water rights would not be before the Board in this matter.

Mr. Chicoine has submitted an application for a shoreline alteration permit to the South Dakota Department of Game, Fish and Parks (SDGFP), who is authorized to issue such permits. Mr. Chicoine's application proposes to construct a canal from McCook Lake into an area currently comprised of farmland to provide lake access to a residential development planned for that location. The canal construction will consist of an 11-foot deep, 110-foot wide canal that is approximately 1,800 feet in length. SDGFP expressed concerns about the integrity of the canal liner if the liner dried out, cracked, or floated. SDGFP informed Mr. Chicoine that his application for a shoreline alteration permit would be held in abeyance until a water right was obtained. Consequently, to address those concerns, Mr. Chicoine applied for a water permit (Water Permit Application No. 8447-3) to use an existing irrigation well (Water Permit No. 6557-3) to provide an initial fill of the canal and to maintain the integrity of the canal liner by keeping the liner saturated during low water level periods.

DISCUSSION

South Dakota's Administrative Procedures Act requires agencies to provide rules establishing the procedures for the filing and disposition of petitions for declaratory rulings. See SDCL § 1-26-15.⁴ The Board, which qualifies as an agency pursuant to SDCL § 1-26-1(1), has been granted the authority to determine the minimum procedural requirements to proceed to a

⁴ "Controversies and disputed questions of fact do not preclude a case from declaratory procedures." *Romey v. Landers*, 392 N.W.2d 415, 418 (S.D. 1986) (citations omitted).

hearing regarding a petition for a declaratory ruling. See SDCL § 46-2-5(4).

Accordingly, the Board has promulgated rules pursuant to SDCL § 46-2-5 regarding the procedures for requesting a declaratory ruling from the Board.

Those rules set forth the requirements of the petition, particularly that a factual situation within the Board's jurisdiction must be submitted. See ARSD § 74:02:01:46. ARSD § 74:02:01:46 provides as follows:

Request to board for declaratory ruling -- Petition contents. A person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order pertaining to a submitted factual situation within the board's jurisdiction by submitting a petition containing the following information:

- (1) The authority by which the petition is presented;
- (2) The name of the person, agency, or groups submitting the petition;
- (3) The requested action and reasons for the action; and
- (4) The signature of the person or the authorization of the group or agency making the petition.

The rules also set forth who a petitioner must serve and provides as follows:

Petitioner to notify all affected persons. The petitioner shall serve a copy of the petition upon all known persons whose pecuniary interests would be directly and immediately affected by a declaratory ruling on the petition. Proof of such service shall be filed with the board with the petition. All such parties shall be notified by the chief engineer at least 15 days before the petition is scheduled to be heard. In addition, the petitioner shall publish a notice of hearing describing the contents of the petition pursuant to SDCL 46-2A-4(1) to 46-2A-4(10), as applicable, and SDCL 1-26-17.

ARSD § 74:02:01:48.

A. Requested Relief

Petitioner has altered the requested relief throughout the course of this matter. The rules require that the petitioner set forth the requested action and the reasons for the action. The rules then require public notice "describing the

contents of the petition.” The requested relief has been significantly altered from its initial presentation to what was set forth in the public notice and then again modified during the hearing to continue this matter. Such actions are in contravention of the rules. Petitioner should not be allowed to alter the request in this manner nor be allowed to seek any relief beyond that requested in the public notice.

Regardless of the uncertainty as to which question is being presented (the petition, the letter, or the public notice), the Chief Engineer asserts that the Association has not complied with the rule requiring service upon all parties “whose pecuniary interests would be directly and immediately affected” by the requested ruling. If the hearing is proceeding as to the requested relief sought in the petition, then the Chief Engineer believes that, at the very least, all landowners surrounding McCook Lake would have to be served.⁵

The requested relief in the petition seeks a ruling that any shoreline alteration by a private individual would require a water appropriation permit. Shoreline alteration permits are administered by SDGFP. Its official position regarding alterations is set forth in the 2023 Fishing Handbook which is issued by the State. It provides, in pertinent part,

Activities for which a permit may be required include: construction of ditches or channels[;] dredging or excavating to remove sediment, or

⁵ It is the position of the Chief Engineer that this conclusion is correct only because the petition refers to an attached letter setting forth the facts upon which the petition is based. That letter specifically discusses McCook Lake and thus narrows “public water body” to McCook Lake. Otherwise, the ruling could be applicable to all public waters in the state as the South Dakota Supreme Court has held that all water is public. *Duerre v. Hepler*, 2017 S.D. 8, ¶38, 892 N.W.2d 209, 222.

rock[;] seawall installation or repairs[;] retaining wall or breakwater construction[;] rip-rap installation or repairs[;] filling or creating artificial beach[;] stockpiling brush, trees, vegetation, construction materials or debris in the lake or on the shore[;] removal or clearing of aquatic vegetation[;] any other activity that may have an impact on the lake, lakebed, or lakeshore[.]

South Dakota Game, Fish and Park, *2023 Fishing Handbook*, 65 (2023), available at <https://www.flipsnack.com/sdgamefishparks/2023-south-dakota-fishing-handbook.html>.

Given the nature of the request within the petition, the landowners with property touching McCook Lake would need to be served.⁶ Presumably many landowners whose property abuts McCook Lake will engage in some sort of activity which may constitute a shoreline alteration. Requiring a water appropriation permit for any alteration on a “public water body” (interpreted as McCook Lake) would necessarily have a pecuniary impact on every landowner who possesses land abutting a “public water body” (interpreted as McCook Lake) especially when an “alteration” includes such actions as the building of a dock or deck that may extend over the shoreline, installation of rip rap along a shoreline, construction of retaining walls and breakwaters, and removal or clearing of aquatic vegetation among other things.⁷ Moreover, these

⁶ It is the undersigned counsel’s understanding, based on sworn statements made on behalf of the Association during legislative committee hearings and the petition in this matter, that membership in the Association is voluntary and that not all the property owners surrounding McCook Lake are members of the Association. This understanding is further buttressed by the statement in the Association’s letter indicating that it “functions on donations and volunteerism.”

⁷ This may seem an absurd result, but the requested ruling in the petition is quite broad.

landowners are “known” as one need only look at the pertinent county property records. There may also be other individuals who should also be required to be served. Determination of those individuals would undoubtedly be more difficult but not impossible. Additionally, the Chief Engineer asserts that SDGFP, which has responsibility for the issuance of permits to alter a shoreline, would arguably have a pecuniary interest in a proceeding such as this.⁸

Further, as previously discussed, the petitioner is required by ARSD § 74:02:01:48 to “publish a notice of hearing describing the contents of the petition pursuant to SDCL 46-2A-4(1) to 46-2A-4(10), as applicable, and SDCL 1-26-17.” Here, the public notice fails to indicate the relief requested in the petition. Rather, the public notice sets forth that the relief requested is

Michael Chicoine/Dakota Bay, LLC are required to make an application to the Water Management Board for a permit to appropriate water before starting any construction or placement of works to expand McCook Lake for Michael Chicoine’s/Dakota Bay, LLC’s private use, because the proposed construction appropriates the water of McCook Lake and would also unlawfully impair the McCook Lake Recreation Area Association’s water rights[]

as opposed to the petition which seeks

a Declaratory Ruling that the alteration of a public water body by a private party requires a permit for appropriation of water, consistent with Mr. Gronlund’s testimony to the Agriculture and Natural Resources Committee and consistent with State law.

⁸ The Chief Engineer is not asserting any obligation for GF&P to participate in the hearing only that GF&P should be given notice and an opportunity to participate.

What was set forth in the public notice cannot be fairly said to place the public, or those landowners whose pecuniary interests in their land would be affected, on notice of the broad scope of the requested relief. Thus, the Association should be limited to the relief requested in the public notice and as further limited by counsel during the June 30, 2023 hearing before the Board.

A. Appropriation

The petitioner asserts that the construction of the canal would constitute an appropriation. A basic understanding of South Dakota water law is helpful when interpreting the statutes. At the time of statehood, South Dakota utilized a riparian system of water rights. Under a riparian system, the right to use water results from possessing land which borders, or through which runs, a watercourse. Water rights, therefore, were necessarily appurtenant to the land.

In 1905, the South Dakota Legislature, however, adopted the doctrine of prior appropriation. *Parks v. Cooper*, 2004 S.D. 27, ¶ 29, 676 N.W.2d 823, 833. Prior appropriation provides framework for determining who gets to use water during times of scarcity. Water rights are granted and protected based upon when the claim is made. During times of scarcity of water, those rights which were granted first have priority and will receive water before those rights which were granted later. It is often shortened to “first in time, first in right.” See SDCL § 46-5-7.

While South Dakota utilizes a prior appropriation system now, it recognizes those riparian rights which existed prior to the adoption of prior appropriation framework. With regard to either a riparian or a prior

appropriation water right, the right is merely usufructuary. See SDCL §§ 46-1-3 and 46-5-30.2. The user of the appropriated water may only use the appropriation for the purpose set forth in the permit and once used or released the right to use is extinguished. Unlike rights under the riparian system, water rights under the prior appropriation system can be forfeited or abandoned if not used.

Under South Dakota law, “[e]xcept as otherwise provided throughout this title, no person may appropriate the waters of this state for any purpose without first obtaining a permit to do so.” SDCL § 46-1-15. Thus, central to understanding this water permitting scheme is understanding what constitutes an appropriation.

“Appropriation” is not defined in statute. The plain meaning of “appropriation” is “the exercise of control over property....” *Black’s Law Dictionary* (11th ed. 2019). Likewise, Merriam Webster defines “appropriate” as “to take exclusive possession of ...; to set apart for or assign to a particular purpose or use” and further provides that synonyms for “appropriation” include “allocation”, “allotment”, and “entitlement”. See *Appropriate Definition*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/appropriate#h2> (last visited 7/17/23); and *Appropriation Definition*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/appropriation> (last visited 7/17/23). With these definitions in mind, the statute can then be understood to require a permit

before control or possession of water may be had or before water can be set aside for a particular purpose.

Additionally, it is generally understood in western water law that an appropriation requires the beneficial use of the water. That concept is a constant throughout South Dakota's statutory scheme and is most evident in the fact that an appropriation may be canceled for failure to place water to beneficial use. *See* SDCL §§ 46-5-25, 46-5-31.1, 46-5-36, 46-5-37, 46-5-37.1 (all providing for the cancellation of a water right for failure to place the water to beneficial use).

Under South Dakota law, an appropriation permit can be issued in several variations: a "traditional" permit, a future use permit, a temporary use permit, or a temporary permit for use of public waters for construction, testing, or drilling. *See* SDCL §§ 46-2A-9, 46-5-38, 46-5-39, and 46-5-40.1. Each permit has a slight variation in the requirements and conditions for issuance.

Here, it is the position of the Chief Engineer that the proposed canal, as originally presented, does not constitute a continuing appropriation of water from McCook Lake and does not require a "traditional" water permit.⁹ The Chief Engineer asserts that this initial fill could be made through use of a temporary permit for use of public water for construction, testing, or drilling

⁹ Mr. Chicoine filed Water Permit Application No. 8744-3 to satisfy a condition for approval of the SD GF&P Shoreline Alteration Permit. As a result, he has applied for a new permit to allow use of his irrigation well for a one-time fill of the canal and thereafter to keep the canal liner wet as a condition for issuance of the Shoreline Alteration Permit.

purposes.¹⁰ Once that initial fill is made, the water in the canal becomes inseparable from the waters of McCook Lake. It is not set apart. Mr. Chicoine would not be able to exercise possession or control over the water.

To the extent that the Association asserts that the law requires a permit in place to cover evaporation or seepage, such an assertion is not an accurate reading of the law. The occurrence of evaporation or seepage are a natural part of the hydrologic cycle. Water permits are not required for evaporation or seepage. Such occurrences are not beneficial uses. They are byproducts of nature. To adopt petitioner's logic would, for example, also require an individual who has received a water right to impound water in a dry draw dam to also obtain a water right for evaporation and seepage. Stated another way, applying the Association's logic specifically to McCook Lake, any property owner on McCook Lake who is not a member of the Association's efforts to offset seepage and evaporation losses through the Association's Missouri River

¹⁰ Such a temporary permit is authorized by SDCL § 46-5-40.1 which provides:

The Water Management Board may promulgate rules to authorize the chief engineer to issue temporary permits for the use of public water for construction, testing, or drilling purposes. No temporary permit is valid after December thirty-one of the year in which the permit is issued. No temporary permit may be issued if the permit interferes with or adversely affects prior appropriations or vested rights. A temporary permit shall contain qualifications and limitations necessary to protect the public interest. The issuance of a temporary permit is permission to use public water on a temporary basis and does not grant any water rights.

The rules promulgated by the Board regarding temporary permits for use of public waters for construction can be found at ARSD §§ 74:02:01:32 through 74:02:01:34.02.

water rights/permits would either be required to support the Association or obtain their own water right to offset water evaporation and seepage *and* be compelled to utilize that right.

B. Unlawful Impairment

The Association's requested relief, as set forth in the public notice, requests the Board to rule that Mr. Chicoine's proposed canal would result in an unlawful impairment of their existing water rights. The term "unlawful impairment" is not precisely defined by statute. However, in western water law, unlawful impairment is understood as the inability to obtain the water to which one is lawfully entitled to use because of someone else's use. Unlawful impairment then occurs when a junior water right in the same water source prevents a senior water right from obtaining its lawful allocation.

The Board having received the mandate to place water to maximum beneficial use and the corresponding obligation to prevent the unlawful impairment of existing rights, promulgated rules setting forth requirements necessary to receive protection under the law. In the case of ground water, to receive protection, the Board has determined that a well must meet the definition of "adequate well". See ARSD §§ 74:02:04:20(6) and 74:02:04:23.01. This definition requires that the potentially impaired well be constructed in a manner that allows the pump to be placed at least 20 feet below the top of the aquifer or as near to the bottom of the aquifer as possible if the aquifer is less than 20 feet. Likewise, an unlawful impairment of a domestic well has also

been defined as an adequate well that “will no longer deliver sufficient water for the well owner’s needs”. See ARSD § 74:02:04:20(7).

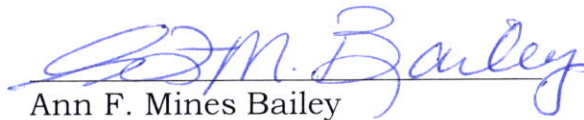
The Association holds two water permits/rights, Water Right No. 5878A-3 and Water Permit No. 6479-3. These water permits/rights authorize a withdrawal of surface water from the Missouri River to maintain/stabilize the lake levels in McCook Lake. Nothing about the proposed canal will impede the Association’s ability to withdraw water from the Missouri River. There simply is no unlawful impairment.

The Association additionally asserts in the letter attached to the petition “Taking of the Lake water is a taking from the [Association’s] water right which must be appropriated as required by law.” First, the Association has no right to the water in McCook Lake. The Association’s rights are to divert water from the Missouri River to McCook Lake. There is no possessory right to the water at any time – only a right to use. Moreover, the Association is divested of the right to use the Missouri River diversions once deposited in McCook Lake. The Association cannot remove the water or place the water to a different beneficial use other than to stabilize the lake level. Moreover, to adopt the Association’s reasoning would be to grant them a *de facto* right to the entirety of the volume of water in McCook Lake merely because they have the right to pump when the lake elevation drops to 1090.3 feet msl.¹¹

¹¹ The Board has set the ordinary high water mark for McCook Lake at 1090.7 feet msl.

For the reasons set forth above, the Chief Engineer requests that Board deny the requested ruling and instead rule that the mere construction of a canal, or alteration of a shoreline, without more information, does not necessarily require obtaining a “traditional” permit for an appropriation of water. The Chief Engineer further requests that the Board deny any requested ruling that Mr. Chicoine’s proposed project unlawfully impairs the Association’s water rights to divert water from the Missouri River.

Dated this 21st day of July 2023.



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STATE OF SOUTH DAKOTA
DEPARTMENT OF AGRICULTURE AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF REQUEST FOR
DECLARATORY RULING BY MCCOK
LAKE RECREATION AREA
ASSOCIATION

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Chief Engineers Prehearing Brief, in the above matter, were served by U.S. mail, first-class, postage prepaid, upon the following on this 21st day of July 2023:

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